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No. 05-353

IN THE

Supreme Court of the United States

PEABODY WESTERN COAL COMPANY *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 248-0783

CHARLES A. HOBBS
Counsel of Record
HOBBS, STRAUS, DEAN & WALKER
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282

RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N Street, NW
Washington, DC 20036
(202) 785-4166

Counsel for Amici Curiae

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may, in a Civil Rights Act enforcement-type civil lawsuit against a coal-mining company, make an Indian tribe an unwilling party to the case, by joining the tribe as a party under F.R.Civ.P. Rule 19, when a statute (42 U.S.C. §2000e-5(f)) forbids the EEOC from filing a lawsuit directly against the Tribe, but rather gives the Attorney General that exclusive power (assuming argendo that tribal sovereign immunity has been waived so as to permit it).

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Established in 1944, the Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native groups. NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than amici or their members made a monetary contribution to the preparation or submission of this brief.

In addition to National Congress of American Indians, the other amici are:

> Mandan Hidatsa Arikara Nation, located on the Fort Berthold Reservation, North Dakota.
>
> Eastern Cherokee Band of Indians, located on the Eastern Cherokee Reservation, North Carolina.
>
> White Mountain Apache Tribe, located on the Fort Apache Reservation, Arizona.
>
> Confederated Tribes of Siletz Indians, located on the Siletz Reservation, Oregon.[2]
>
> Metlakatla Indian Community, located on the Annette Islands Reservation, Alaska.
>
> All Indian Pueblo Council, located in Albuquerque, an association of 19 Pueblo Indian tribes in New Mexico, each with its own reservation and government.
>
> Hualapai Tribe, located on the Hualapai Reservation in Arizona.

The tribes who are amici herein have a strong interest in the status quo of their Indian preference laws (usually called "TERO ordinances," meaning tribal employment rights ordinances). On their reservations employers would not employ as many Indians except for the Indian preference ordinances. Unemployment tends to be high on remote Indian reservations. Indian preference laws help insure that qualified Indians are hired for work they can perform, which (1) is an important exercise of tribal self-government; (2) strengthens the tribal community; and (3) reduces need for federal assistance.

In addition to their interests in maintaining their own Indian preference laws, Indian tribes have a statutory right to

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[2] Siletz does not have an Indian preference ordinance at the present time, but may have one in the future. It supports this brief.

have any challenge to their Indian preference laws be brought only by the U.S. Attorney General as provided in 42 U.S.C. §2000e-5(f)(1), and then only if tribal sovereign immunity has been waived. The EEOC should not be recognized as having power to challenge an unconsenting tribe's laws by way of Rule 19 joinder, as was done here.

ARGUMENT

The immediate issue herein and the issue that brings Amici to this Court, is whether the EEOC can, under F.R.Civ.P. Rule 19, involuntarily implead an Indian tribal government to have its Indian preference laws voided, in the face of 42 U.S.C. § 2000e-5(f), which states:

> "(1) . . . In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. . . ."

The EEOC recognizes that the Navajo Nation is a "government," *see* Pet. App. 35a.

I. INDIAN PREFERENCE LAWS HAVE A LONG HISTORY IN AMERICAN INDIAN AFFAIRS.

The concept of Indian preference has been on the federal statute books for many years. In 1834 Congress enacted what today is 25 U.S.C. § 45, requiring that in all cases of persons "employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties." *See also* 25 U.S.C. § 46 (1882), § 44 (1894), and § 47 (1908).

In 1934, section 12 of the Indian Reorganization Act directed the Secretary of the Interior to set standards of ability

for Indians who may be appointed as administrators of service to Indians, and such qualified Indians "shall hereafter have the preference to appointment to vacancies in any such positions." 25 U.S.C. § 472.

In 1950 Congress enacted the Navajo-Hopi Rehabilitation Act which provides that "Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws." 25 U.S.C. §633.

In 1964 Congress enacted the Civil Rights Act which prohibited discrimination in private employment, but at the same time exempted preferential employment of Indians by tribes or industries located on or near Indian reservations. 42 U.S.C. §§ 2000e(b) and 2000e-2(i).

In 1972 Congress required that Indians be given preference in Government programs for training teachers of Indian children. 20 U.S.C. §§ 887c(a) and (d), and § 1119a.

In 1975 the Indian Self-Determination Act provided certain Indian preferences,[3] which were amended in 1994 to add that with respect to any self-determination contract that is intended to benefit one tribe, "the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract . . . ." 25 U.S.C. § 450e(c).

In 1972, this Court ruled that the Indian preference laws governing employment in the U.S. Bureau of Indian Affairs, were constitutionally permissible under the Equal Employment Opportunities Act of 1972, because they were not

---

[3] 25 U.S.C. § 450e(b). The following year the Indian Health Service was authorized to give preference to Indians in construction of Indian health facilities. 25 U.S.C. § 1633.

racially based, but are "reasonably designed to further the cause of Indian self-government ... ." *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (unanimous).

II. MOST MAJOR INDIAN TRIBES TODAY HAVE TRIBAL EMPLOYMENT RIGHTS ORDINANCES, I.E. INDIAN PREFERENCE LAWS

Most of the major Indian tribes today have TERO ordinances granting employment preference to Indians generally or to certain Indians. For example the TERO ordinance of Amicus White Mountain Apache Tribe grants three tiers of preference—first to tribal members; then to Indian spouses of tribal members; and finally to other Indians. *See* Appendix A. Some, like Navajo, have elected to give preference only to their own members. Other tribes have still other versions, according to the choices of the respective tribes. These choices are exercises of tribal self-government, tailored to the uniqueness of each tribal community.[4]

To illustrate the pervasiveness of these ordinances throughout Indian country, amici point to the Council of Tribal Employment Rights.[5] This is a coalition of Indian tribes who have TERO ordinances and desire the benefit of networking with other tribes who also have TERO ordinances. Speaking

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[4] It is our understanding that the EEOC does not object to tribal laws that grant employment preference to all Indians, but objects to those which grant preference only to Indians who are members of the governing tribe, such as the Navajo TERO ordinance ultimately to be in question in the instant case if the Ninth Circuit ruling is allowed to stand.

[5] Council of Tribal Employment Rights, founded in 1978, is headquartered in Phoenix. It currently has 101 dues-paying members. It has provided TERO training to the BIA and other government agencies, and has helped tribes secure TERO contracts from the EEOC. It is funded by grants from the Administration for Native Americans, contracts with federal agencies and others, and membership dues. CTER is not an amicus in this proceeding.

of the tribes in the lower 48 states (i.e. excluding Alaska and Hawaii), there are currently 101 dues-paying tribes who are members of CTER. Most of these are well-known tribes with well-organized governments.[6]

As for the Alaska Native organizations, the CTER estimates that the Alaska Native organizations who are among its members represent directly or indirectly about 150 of the 229 federally recognized Alaska Native organizations on the Secretary's list.

These numbers are presented in order to illustrate the nation-wide impact that would ensue should there be any change to the status quo of TERO ordinances, and to the exclusive power of the Attorney General to challenge them (assuming arguendo that tribal sovereign immunity has been waived). The impact would be especially severe were the decision of the Ninth Circuit allowed to stand. Within that Circuit reside 74% of the 564 federally recognized tribes.[7]

If tribal TERO ordinances can be federally challenged at all (and they cannot be unless tribal sovereign immunity is held to have been waived), then it is important to tribes that the challenge be made only by the Attorney General, as Congress intended, and not by the EEOC. The reason is that the Attorney General is much more politically sensitive than the EEOC, and rightly so, since interference with tribal laws involves interference with a sovereign government, which

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[6] According to the Secretary's latest official list of federally recognized Indian tribes, there are 335 such tribes in the lower 48 states. 70 Fed. Reg. 71194 (Nov. 25, 2005). The 101 tribes who are members of CTER tend to be the larger and more organized tribes. Not all major tribes are members; Navajo, for example, is not a member. A list of these tribes appears as Appendix B, and also on the website of an Indian tribe: tulaliptero.com/terowebapplications/terodirectory.aspx.

[7] Of the 564 tribes listed in the Secretary's list of federally organized tribes (229 in Alaska and 335 in the lower 48 states), 419 are within the Ninth Circuit (229 in Alaska and 190 in the lower 48—or 74%.

is inherently a political matter, a factor not relevant to the EEOC's primary mission. The Attorney General would be more likely to settle differences by negotiation rather than by litigation, and more likely to give weight to tribal cultural factors and the trust relationship of the United States to Indian tribes.[8]

III. THE CIRCUITS ARE SPLIT ON RULE 19

As argued in Peabody Coal's Petition for Certiorari, there is a split between the Circuit Courts of Appeals as to whether Rule 19 permits involuntary joinder of a party defendant, where the plaintiff lacks power to sue directly. Petn. p. 8-15. It is inappropriate that Indian tribes in some circuits have rights that are denied similarly situated tribes in other circuits. This Court should grant the Petition in order to make Rule 19 uniform for all circuits.

IV. THE UNITED STATES HAS A CONFLICT OF INTEREST IN THIS MATTER

This Court should note that the United States has a conflict in this matter. On the one hand, it has an interest (through the EEOC) in enforcing the equal employment opportunity laws. On the other hand, it has a fiduciary relationship with the Indian tribes of this county, *see e.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983), and through the Secretary of the Interior, 43 U.S.C. § 1457(10), an obligation to support tribal self-governance decisions. *See Morton v. Mancari*, supra.

This Court should grant Certiorari to determine the proper balance to be struck between these interests.

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[8] The Department of Justice actually has a desk devoted to the interplay between tribal and federal interests—the Office of Tribal Justice.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF
AMERICAN INDIANS
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 248-0783

CHARLES A. HOBBS *
HOBBS, STRAUS, DEAN & WALKER
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282

RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N Street, NW
Washington, DC 20036
(202) 785-4166

* Counsel of Record

Counsel for Amici Curiae

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APPENDICES

APPENDIX A

ORDINANCE 203 OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

BE IT ENACTED by the White Mountain Apache Tribal Council in Council Assembled that Chapter One, Section 1.2D. of the Labor Code of the White Mountain Apache Tribe shall be amended as follows:

D. Indian preference means the following priority order of preference:

(1) Enrolled member of the White Mountain Apache Tribe.

(2) Indian spouse of an enrolled member of the White Mountain Apache Tribe.

(3) Other Indians.

The above preference priority applies to all employment activities, including those undertaken pursuant to the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, except for employment funded by federal government programs unrelated to the Indian Self-Determination Act, which shall have the following priority order of preference:

(1) Local Indian.

(2) Other Indian.

The foregoing ordinance was on December 20, 1995, duly adopted by a vote of 10 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (i), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ _____

APPENDIX B

Council of Tribal Employment Rights
2005

I. Alaska Region	State
1. Alaska Native Coalition on Employment and Training	AK
2. Aleutian/Pribilof Islands Association	AK
3. Arctic Slope Native Association	AK
4. Association of Village Council Presidents	AK
5. Bristol Bay Native Association	AK
6. Central Council Tlinget and Haida Indians	AK
7. Chugachmiut Inc.	AK
8. Cook Inlet Tribal Council	AK
9. Copper River Native Association	AK
10. Kawarek Inc.	AK
11. Kodiak Area Native Association	AK
12. Maniilaq Manpower	AK
13. Metlakatla Indian Community	AK
14. Sitka Tribe	AK
15. Tanana Chiefs Conference	AK

II. Dakota Coalition	
Cheyenne River Sioux	SD
Crow Creek Sioux	SD
Lower Brule Sioux	SD
Oglala Sioux	SD
Omaha Tribe	NE
Rosebud Sioux	SD
Sisseton Wahpeton Sioux	SD
Spirit Lake Sioux	ND
Standing Rock Sioux	ND
Three Affiliated Tribes (Mandan, Hidatsa, Arikara)	ND
Turtle Mountain Chippewa	ND
Yankton Sioux	SD

III. Eastern Region	State
1. Alabama Intertribal Council	AL
2. Eastern Band of Cherokees	NC
3. Mohegan	CT
4. Narragansett	RI
5. Poarch Band of Creek Indians	AL
6. Seminole Tribe of Florida	FL
7. Seneca Nation	NY
8. Wampanoag Tribe of Gay Head (Acquinnah)	MA

IV. Great Lakes Region	
1. Bois Forte Tribe of Chippewa	MN
2. Fond du Lac Chippewa	MN
3. Ho-Chunk Nation	WI
4. Keeweenah Bay Tribe	MI
5. Leech Lake Band of Ojibway	MN
6. Mille Lacs Band of Ojibway	MN
7. Oneida Nation	WI
8. Red Lake Band of Chippewa	MN
9. Stockbridge Munsee Tribe	WI
10. White Earth Band of Chippewa	MN

V. Pacific Northwest Region	
1. Couer d'Alene Tribe	ID
2. Colville Confederated Tribes	WA
3. Confederate Tribes of Siletz	OR
4. Confederate Tribes of Umatilla	OR
5. Confederate Tribes of Warm Springs	OR
6. Ft. McDermitt Pai-Sho	NV
7. Fallon Paiute Shoshone	NV
8. Grande Ronde Tribe	OR
9. Hoopa Valley Tribe	CA
10. Kootenai Tribe	ID
11. Lower Elwha Klallum	WA
12. Lummi Nation	WA

	State
13. Makah Tribe	WA
14. Muckleshoot Tribe	WA
15. Nez Perce Tribe	ID
16. Puyallup Tribe	WA
17. Quinault Nation	WA
18. Shoshone Bannock	ID
19. Shoshone Paiute Duck Valley	NY
20. Spokane Tribe	WA
21. Swinomish	WA
22. Tulalip	WA
23. Upper Skagit	WA
24. Walker River Paiute	NV
25. Yakama Nation	WA
26. Yurok Tribe	CA
VI. Rocky Mountain Region	
1. Blackfeet Nation	MT
2. Chippewa Cree of Rocky Boy Reservation	MT
3. Crow Tribe	MT
4. Fort Peck (Assiniboine/Sioux)	MT
5. Gros Ventre/Assiniboine Tribes (Ft. Belknap)	MT
6. Northern Cheyenne	MT
7. Salish-Kootenai (Flathead)	MT
8. Shoshone and Arapaho Tribes	WY
9. Southern Ute	CO
10. Ute Mountain Ute	CO
VII. Southern Plains	
1. Cherokee Nation	OK
2. Cheyenne and Arapaho Tribes	OK
3. Comanche Tribe	OK
4. Four Tribes Consortium of Oklahoma	OK
5. Kickapoo Tribe in Kansas	KS
6. Kiowa Tribe	

	State
7. Otoe-Missouri Tribes	OK
8. Pawnee Tribe	OK
9. Ponca Tribe	OK
10. Seminole Tribe of Oklahoma	OK
11. Wichita and Affiliated Tribes	OK
VIII. Southwest Region	
1. Big Pine Paiute	CA
2. Bishop Tribe	CA
3. California-Indian Manpower Consortium	CA
4. Chemehuevi Tribe	CA
5. Cocopah Tribe	AZ
6. Colorado River Tribe	AZ
7. Fort Mohave Tribe	CA
8. Gila River Indian Community	AZ
9. Hopi Tribe	AZ
10. Hualapai Tribe	AZ
11. Jicarilla Apache	NM
12. LaJolla Band of Mission Indians	CA
13. Moapa Band of Paiutes	CA
14. Pascua Yaqui Tribe	AZ
15. Quechan Tribe	AZ
16. Reno Sparks Indian Colony	NV
17. San Carlos Apache	AZ
18. San Juan Pueblo	NM
19. San Pasqual Band of Mission Indians	CA
20. Tohono O'Odham Nation	AZ
21. Torres Martinez Desert Cahuilla	CA
22. White Mountain Apache	AZ
23. Yavapai Apache	AZ
24. Zuni	NM

See also www.TulalipTERO.com/TEROWebApplications/TERODirectory.ASPX for virtually the same list.

Summary of CTER Members in the Lower 48 States

Dakota Coalition	12
Eastern Region	8
Great-Lakes Region	10
Pacific NW Region	26
Rocky Mt. Region	10
Southern Plains Region	11
Southwest Region	24
	101
Alaska	15 members representing about 150 of 229 Native groups